Supreme Court, U.S.
FILED
DEC 6 1996
CLERK

No. 96-656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

GLEN FRANKLIN KOONTZ*

1155 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036
(202) 467-8580

Counsel for Petitioners
Counsel of Record*

8 pp

TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PETITIONERS' REPLY BRIEF	1
A. THE POLICY IS FACIALLY INVALID	1
B. CLARITY IS REQUIRED TO SETTLE CONFUSION IN THE LOWER COURTS WITH RESPECT TO *DOLAN*	3
C. REVIEW OF THIS CASE IS APPROPRIATE	4

TABLE OF AUTHORITIES

Cases	Page(s)
Agins v. Tiburon, 447 U.S. 255 (1980)	3, 4
Dolan v. City of Tigard, 114 S.Ct. 2309 (1994)	*passim*
Ehrlich v. City of Culver City, 911 P.2d 429 (Calif. 1996)	4
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)	4
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	4
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	4
United States v. Salerno, 481 U.S. 739 (1987)	2

No. 96-656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

PETITIONERS' REPLY BRIEF

Respondent offers three (3) reasons why this Court should not review this case. First, Chesterfield County argues that its Policy does not actually do what it purports to do, despite its language to the contrary, and that in any event, Chesterfield County may actually disregard its Policy on occasion. Second, Chesterfield County argues—contrary to the authorities presented—that there is no confusion or conflict concerning the application of *Dolan v. Tigard*, 114 S.Ct. 2309 (1994) in the lower courts. Third, and finally, Chesterfield County claims that the Policy is too "unique" for any review by this Court to be of value. As shown below, each of Chesterfield County's arguments fail.

A. THE POLICY IS FACIALLY INVALID

Chesterfield County relies upon the District Court's reasoning that there is no apparent reason why proffers required by the Policy cannot be determined in an "'individualized' manner" for its claim that the Policy complies with

Dolan.[1] Such reasoning begs the question, however, for neither the Policy's language or Chesterfield County's practice comports with *Dolan*'s requirement that an "individualized determination" be conducted to demonstrate the "rough proportionality" of the required proffers.[2]

First, the proffers are mandatory. That that is so is demonstrated by the Policy's language. It is also demonstrated by Chesterfield County's practice since on only one (1) occasion has a residential rezoning application been approved without the payment of proffers.[3] This single exception does not mean the Policy is constitutional; rather, this example merely demonstrates that on one occasion Chesterfield County failed to enforce its Policy.[4]

Second, *Chesterfield County does not make any sort of "individualized determination"*, but rather employs its "complex

---

[1] *See* Respondent's Brief in Opposition ("Respondent's Brief") at 10; Petition for Writ of Certiorari ("Petition"), Appendix ("App.") at B6-7.

[2] Despite Chesterfield County's fervent denials, the Petitioners rely upon the Policy's language to support its claim that proffers are required and mandatory. *See* Petition at 15; App. at B3. Moreover, since Chesterfield County raises the issue of affidavits submitted below, it should be noted that all the numerous affidavits submitted by Petitioners stated unequivocally that proffers were mandatory as a condition for residential rezoning and that Chesterfield County *never* conducted *any* individual determinations to ascertain a proposed development's projected impact upon existing public services and infrastructure.

[3] Respondent's Brief at 10a.

[4] In order to survive a facial challenge, it must be shown that there are no circumstances under which the Policy could be applied consistent with the constitutional requirements set out in *Dolan*. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiff "must establish that no set of circumstances exist under which the Act would be valid."). Petitioners have made such a demonstration. *See* Petition at 14-19. It is of no consequence that in enforcing the flawed Policy, Chesterfield County might, on occasion, extract from a developer dedications which turn out to be "roughly proportional" to his development's impact. Such a result would not follow from the enforcement of the Policy, but rather would merely constitute a coincidence of fate. The Policy—as written and as enforced—is fatally flawed and unconstitutional.

methodology" which it claims is more than sufficient to calculate costs imposed by all new residential development.[5] This "one-size-fits-all" Policy is not constitutionally sound when it is used to calculate dedications to be required as a condition of property use. As this Court held in *Dolan*, "generalized statements as to the necessary connection between the required dedication and the proposed development" are constitutionally insufficient. *Dolan*, 114 S.Ct. at 2318. Certainly if this Court did not mean that determinations must be "individualized", then it would have used a different word. *Dolan*'s "individualized determination" requirement is a mandate, not merely a good idea. *Dolan*, 114 S.Ct. at 2319-20.[6]

B. CLARITY IS REQUIRED TO SETTLE CONFUSION IN THE LOWER COURTS WITH RESPECT TO *DOLAN*

As demonstrated in the Petition, certain clarifications are indeed needed to guide the lower courts in applying *Dolan's* requirements. Illustrative of the confusion below is the apparent concern by both the District and Circuit Courts in applying the *Agins v. Tiburon*[7] standard to this *Dolan* type challenge. Another example is the California Supreme Court's

---

[5] *See* Respondent's Brief at 10. According to Chesterfield County, the methodology's complexity "ensures" that the proffers are "proportional". Respondent's Brief at 10, n.5. Indeed, "complex" does not equate with accurate and is certainly no guarantee of "rough proportionality".

[6] Chesterfield County makes two (2) other incorrect observations with respect to the "individualized determination" issue. First, while the Circuit Court analogized the "individualized determination" requirement to "exact proportionality" in its opinion, Petitioners' counsel *never* advanced that argument. *See* Respondent's Brief at 4. Second, Petitioners' counsel did not "charge" Judges Russell and Widener with anything. Respondent's Brief at 10. However, *as a matter of fact*, Petitioners' counsel states that both Judges Russell and Widener used the word "stupid" to characterize this Court's "individualized determination" requirement. That Respondent's counsel may not have heard the comments is irrelevant.

[7] 447 U.S. 255 (1980).

application of *Dolan* to a monetary exaction, but its refusal to apply *Dolan* to a legislative enactment which imposed similar dedication requirements. *See Ehrlich v. City of Culver City*, 911 P.2d 429 (Calif. 1996).[8]

Contrary to Chesterfield County's assertions, Petitioners have not tried to "manufacture a conflict among the courts ...."[9] Rather, Petitioners present three (3) areas which require this Court's attention.[10] The authorities cited in the Petition speak for themselves.

C. REVIEW OF THIS CASE IS APPROPRIATE

Chesterfield County argues that this case presents a unique factual setting, thus making further review inappropriate.[11] This argument ignores that the factual settings in *Dolan, Lucas v. South Carolina Coastal Council*,[12] *Nollan v. California Coastal Comm'n*,[13] *and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[14] were also unique. The principles involved, however, as applied to these unique factual settings, are what necessitated this Court's review. The same is true of this case. Where, as here, the Circuit Court has repudiated this Court's mandates, and where there is confusion and conflict among the lower courts generally as to the proper application of *Dolan* in harmonious

---

[8] Chesterfield County misrepresents Petitioners' use of, and argument with respect to, this case. *See* Respondent's Brief at 12, n.8. The Petition accurately represents the *Ehrlich* holding.

[9] *See* Respondent's Brief at 14.

[10] *See* Petition at 10-14. The 3 areas of concern 1) the misapplication of *Agins* to *Dolan* type cases; 2) the appropriate deference to be given to Fifth Amendment claims; and 3) the confusion concerning the application of *Dolan* to monetary exactions and legislative enactments.

[11] *See* Respondent's Brief at 14-16.

[12] 505 U.S. 1003 (1992).

[13] 483 U.S. 825 (1987).

[14] 482 U.S. 304 (1987).

fashion with this Court's other Fifth Amendment jurisprudence, review is appropriate. The Writ should issue.

Respectfully submitted,

GLEN FRANKLIN KOONTZ*

1155 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(202) 467-8580

Counsel for Petitioners The National Association of Home Builders of the United States, The Home Builders Association of Virginia and The Home Builders Association of Richmond

*Counsel of Record

December 6, 1996